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Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET # 97-80

In the Matter of

Implementation of Section 304 of the
Telecommunications Act of 1996

Commercial Availability of
Navigation Devices

CS Docket No. 97-80

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, hereby replies to the various oppositions and comments filed with respect to its August 14, 1998 petition seeking reconsideration of certain aspects of the Commission's decision, released June 24, 1998, in the above-captioned proceeding.¹ While there is no need to reiterate all of the arguments raised by Time Warner in its reconsideration petition, three issues raised in the various oppositions filed warrant this response. These issues concern the phase-out of integrated terminal devices, the right to attach, and the DBS exemption.

I. PHASE-OUT OF INTEGRATED TERMINAL DEVICES

In its petition, while supporting the availability from cable operators of separate security modules for attachment to in home terminal equipment designed for use in connection with the receipt

¹ Report and Order, CS Docket No. 97-80, 1998 FCC LEXIS 3052 (rel. June 24, 1998) ("Order").

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of cable services, Time Warner demonstrated that the blanket prohibition on offering integrated equipment after January 1, 2005 is unnecessary, will be costly to consumers and will impede rather than facilitate the transition to digital video.² While Time Warner believes that MVPDs should be allowed to continue to offer customers the option to lease both integrated and component equipment after January 1, 2005, at the very least this prohibition should not apply to analog equipment. Specifically, the large embedded base of integrated analog decoders, the susceptibility of analog scrambling to theft of service and the eventual transition of consumers from analog to digital video programming services, necessarily warrants a different regulatory approach for analog than for digital equipment. While numerous parties, representing a cross-section of the affected groups filing in this proceeding, have supported exempting analog devices from the navigation devices rules,³ a number of parties have taken issue with this approach, essentially arguing that there is no basis in the statute to distinguish between analog and digital equipment.

In point of fact, Section 629 of the Communications Act does not require that the FCC's implementing regulations be technology neutral. To the contrary, subsection (b) of the statute specifically prohibits the Commission from prescribing regulations that would jeopardize the security of multichannel video programming and other services offered over MVPD systems. The

²Time Warner Petition at 4-9.

³See e.g., Partial Opposition of The Wireless Communications Association International, Inc. ("WCA Opposition"); Comments of Amaurotic New Media, Inc. ("Amaurotic Comments"); Comments of Echelon Corporation ("Echelon Comments"); Comments of the National Cable Television Association ("NCTA Comments"); Opposition of Circuit City Stores, Inc. ("Circuit City Opposition") at 3-5.

⁴See Opposition of Tandy Corporation ("Tandy Opposition") at 4-6; Opposition of The Information Technology Industry Council ("ITIC Opposition") at 4-10; Opposition of The Consumer Electronics Manufacturers Association ("CEMA Opposition") at 17-24.

Commission has recognized on a number of occasions that analog security is far more susceptible to theft of service than digital security, the role of product integration in protecting security integrity, and the need for MVPDs to retain control of any terminal equipment which incorporates analog security.⁵ Accordingly, a technology neutral approach to the Commission's regulations would clearly be inconsistent with the statutory mandate

Furthermore, as pointed out in Time Warner's reconsideration petition, the transition of television broadcasting from analog to digital, and need to deploy digital interface equipment to allow the embedded base of existing analog televisions to display digital television signals, strongly militate in favor of a regulatory approach that encourages consumers to purchase digital boxes that will facilitate this transition, rather than analog boxes that will soon become obsolete.⁶ Obviously, consumer electronics manufacturers and retailers have an economic interest in selling as much equipment as they can. If this happens to mean that consumers will have to replace analog devices purchased at retail with a digital device down the road, all the better for them. However, the purpose of Section 629 was to provide consumers with more choices and less expensive equipment, not to guarantee the profits of the consumer electronics industry. Time Warner submits that a regulatory scheme that will encourage consumers to make significant investments in equipment that will soon become obsolete is not consistent with congressional intent.⁷ In this regard, Time Warner

⁵See First Report and Order in ET Docket No. 93-7, 9 FCC Rcd 1981 (1994) at ¶¶ 29, 72; Report and Order in CS Docket No. 97-80, 12 Comm. Reg. (P&F) 531 (1998) at ¶¶ 14-16, 47, 73.

⁶Time Warner Petition at 8-9; *see also*, Comments by the Association for Maximum Service Television, Inc. ("AMST Comments") at 2-3.

⁷The opposition of consumer electronics manufacturers to Time Warner's suggestion that the creation of a market for component devices could be better supported by requiring that analog
(continued...)

congratulates at least one consumer electronics retailer, Circuit City, for recognizing and supporting the ability of MVPDs to continue to provide integrated analog-only devices if certain conditions are met.⁸

Finally, Time Warner notes that a number of parties have advocated that the Commission limit or eliminate the transition period during which MVPDs may continue to provide integrated equipment to their customers, which is currently scheduled to end January 1, 2005.⁹ While, for the reasons indicated in its reconsideration petition, Time Warner does not believe that a prohibition on the provision of integrated devices is necessary, desirable, or statutorily required, to the extent the Commission retains this prohibition, any reduction in the transition period previously established would not be in the public interest. Without such a transition, cost based rates for cable CPE which

⁷(...continued)

television tuners incorporated into all 19" or larger screen televisions, VCRs and converters sold after July 1, 2000 be equipped with analog decoder interface than by prohibiting MVPDs from offering integrated equipment after January 1, 2005 indicates a realization that such an interface will become unnecessary in a digital environment. See Circuit City Opposition at 4. CEMA Opposition at 23. No other substantive reasons for such opposition are given.

⁸Circuit City Opposition at 3-4. Indeed, Circuit City also appears to recognize the benefits to consumers of allowing MVPDs to incorporate ancillary functions into the circuitry of the security POD under certain circumstances. *Id.* at 14. As indicated in its reconsideration petition, Time Warner continues to believe that product integration can serve the public interest by supporting backwards compatibility of MVPD network upgrades with consumer owned equipment that might not be capable of receiving new services. This is particularly important where the new services offered by a particular MVPD are not yet supported by commercially available equipment. Time Warner Petition at 5. It was not Time Warner's intent to undermine the separation of security from non-security functions, a principal which Time Warner has consistently supported. By the same token, MVPDs cannot be expected to forego or delay the introduction of new services while waiting to see whether consumer electronics manufacturers will manufacture and market the new equipment or modifications to existing equipment needed to support such services.

⁹Tandy Opposition at 6-7; AMST Opposition at 2; Circuit City Opposition 14-15; CEMA Opposition at 16.

has not yet been depreciated will be driven upwards, as operators are forced to accelerate depreciation in order to recover their capital investment in such equipment. The end result is that cable subscribers will be forced to pay higher rates for equipment which they will have to continue leasing from their cable operators since, absent an adequate transition, such equipment will not be readily available on a retail basis because the interface standards allowing the separation of security from non-security functions will not have been finalized.¹⁰ While it is not hard to see why consumer electronics equipment manufacturers and retailers would be happy to see the lease rates for MVPD supplied equipment increase, since such increases would make it easier for them to sell their own products, the Commission's mandate under Section 629 of the Communications Act is to protect the interests of consumers, not equipment manufacturers and retailers. Any such reduction in the transition period previously established by the Commission would not serve consumers.

II. RIGHT TO ATTACH

In its Petition, as well as in its initial comments and reply comments in this proceeding, Time Warner expressed its serious concern, shared by many, that signal piracy and theft of service remain among the most costly problems faced by program producers and MVPDs alike.¹¹ Time Warner

¹⁰Time Warner is somewhat concerned by the insistence of certain cable equipment suppliers, notably General Instrument Corporation ("GI"), that the Commission has no authority under the Communications Act to regulate the activities of equipment manufacturers. GI's attempt to disclaim any responsibility for the successful implementation of Section 629 is particularly troubling since cable operators such as Time Warner must rely on their equipment suppliers to manufacture the component security devices which cable operators are required to offer their customers beginning July 1, 2000. See Comments/Opposition of General Instrument Corporation at 19-24.

¹¹See Time Warner Petition at 12-15; NCTA Comments at 7; Echelon Comments at 12-13; Amaurotic Comments at 1-5. See also, the comments filed in response to the Commission's original NPRM in this proceeding by NCTA at 24, Scientific Atlanta at 23, Time Warner at 8, and US West (continued...)

requested that the FCC clarify that "theft of service." as that term is used under Sections 76.1201, and 76.1209, includes any device which can be used 1) to defeat or assist in defeating copy protection techniques employed by program producers or copyright holders or 2) to facilitate unauthorized receipt of any MVPD service ¹²

Several parties expressed fear that the clarification sought by Time Warner might involve the Commission in making determinations of copyright violations or settling copyright claims.¹³ These fears are misplaced. It is not Time Warner's intent to have the Commission involved in copyright protection issues or the setting of standards. The purpose of the requested clarification is to assure that by according a right to attach, the Commission is not inadvertently establishing a defense for entities whose attachments do in fact defeat copyright protection. That is, a party attaching equipment should not be able to defend itself against a claim of copyright infringement before another regulatory or judicial body by pointing to the right to attach created by the Commission. This should be a simple and unobjectionable proposition

As Time Warner explained in its Petition, it fully supports industry efforts to incorporate copy protection into DVD players and other digital terminal devices that are or will be available commercially and to incorporate copy protection into any standard developed for such devices. It

¹¹(...continued)
at 5.

¹² 47 C.F.R. §76.1201 (excluding "such devices [as] may be used to assist or are intended or designed to assist in the unauthorized receipt of service" from the right to attach); 47 C.F.R. §76.1209 (stating that no provision contained in Subpart P of the rules should be construed "to authorize or justify any use, manufacture or importation of equipment that would violate ... any ... provision of law intended to preclude the unauthorized reception of multichannel video programming service").

¹³ See Opposition of Computer Industry Group to Petition for Partial Reconsideration Filed By Time Warner Entertainment Company; ITIC Opposition at 10-14.

has no desire to inject the Commission into that arena. However, in creating a right to attach, the Commission has made it incumbent upon itself to take an active role to ensure that the integrity of copyright protection technology is maintained. Time Warner has suggested two ways in which the Commission can take such a role. First, the Commission must clarify that the right to attach is accompanied by an exclusion of devices that defeat or assist in defeating copy protection techniques employed by program producers or copyright holders. Second, the Commission must use its equipment certification authority to ban the distribution of any navigation device which has been found to have been used or designed to defeat or assist in defeating copy protection technology.

III. EXEMPTION FOR DBS OPERATORS

In its Petition, Time Warner argued that the Commission had erroneously concluded that its regulations to implement Section 629 would not apply to DBS and OVS operators. In the case of DBS, Time Warner requested that the Commission clarify that DBS systems are already compliant with the regulations and that such a determination would make an exemption for DBS unnecessary.¹⁴

The oppositions of DIRECTV and PRIMESTAR to Time Warner's request for clarification are misguided.¹⁵ DIRECTV takes a particularly curious approach to supporting an exemption, agreeing, in effect, with Time Warner's position that there is no need for an exemption. DIRECTV's position is that an exemption is justified because the Commission "determined that DBS providers already satisfy the standards for commercial availability set forth in Section 629" and that DBS

¹⁴Time Warner Petition at 15-21. There was no opposition to Time Warner's argument against the need for exemption of OVS providers.

¹⁵Opposition of DIRECTV, Inc. to Petitions for Reconsideration ("DIRECTV Opposition") and Primestar Opposition to Petition for Reconsideration filed by PRIMESTAR, Inc. ("PRIMESTAR Opposition").

"already meets the goals that the [security function unbundling] requirement is designed to achieve."¹⁶ PRIMESTAR also argues that the exemption is appropriate because DBS navigation devices are already commercially available.¹⁷ Thus, DIRECTV and PRIMESTAR agree with Time Warner that DBS already complies with the overriding goal of the Commission's rules -- providing consumers with the option to purchase MVPD navigation devices from retail sources -- and thus that there is no need to exempt DBS from rules which DBS operators already comply with.

The Commission must keep in sight that the separation of security from non-security functions in terminal devices is merely a means to an end. -- not an end in and of itself. The Commission's reason for requiring unbundling of the security function is to assure the commercial availability of the navigation devices without jeopardizing the security of MVPD services.¹⁸ Put simply, the unbundling requirement concerns only those MVPDs that employ security techniques which create too great a risk of theft of service to allow navigation devices to be commercially available from independent sources. Since DBS providers are apparently comfortable with making their navigation devices, albeit with certain security functions imbedded, commercially available, they already comply with the statutory mandate. The Commission's basis for the exemption -- "differences in the marketplace for DBS equipment, where devices are available at retail and offer consumers a choice,

¹⁶DIRECTV Opposition at 5. It should be noted that PRIMESTAR does not claim compliance with the security bundling requirement.

¹⁷PRIMESTAR Opposition at 2-3.

¹⁸See, e.g., Order at ¶ 62.

as compared to equipment for other MVPD services " only serves to demonstrate compliance in the case of DBS.¹⁹

Time Warner submits that all the Commission needs to do is to clarify that DBS is already compliant. Such a clarification would moot concerns that the application of the Commission's rules to DBS would "be counterproductive to the Commission's goal of fostering MVPD competition."²⁰ Nor would such rules "disrupt technical and investment structures that arose in a competitive environment."²¹ Put simply, there is no additional burden associated with rules that have already been complied with. Compliance with the Commission's regulations does not establish grounds for an exemption from the applicability of the regulations, instead it moots the need for an exemption.

Instead of pursuing a policy of exempting types of MVPDs based on their current compliance with the rules, Time Warner urges that the more legally defensible and legislatively consistent policy is to make determinations of compliance with the rules thereby making it unnecessary to make any exemptions. This latter approach avoids unnecessarily setting a precedent for the use of exemptions and the Commission's assumption of questionable authority to determine which types of MVPDs will be subject to rules that implement statutory language in Section 629 that clearly applies to all MVPDs. Moreover, by finding that DBS is already compliant, rather than creating an exemption, the Commission will avoid possible misinterpretations of its rules which might interfere with the deployment of "smart card" technology or other security techniques where certain security functions are embedded in the navigation device and certain non-security functions may be embedded in the

¹⁹Id. at ¶ 74.

²⁰Order at ¶64; see also DIRECTV Opposition at 7.

²¹Order at ¶64; see also DIRECTV Opposition at 4-5 and PRIMESTAR Opposition at 3.

security module. Finally, the Commission must assume that at the time Congress enacted section 629, it was aware of DBS equipment availability and its distribution channels and chose not to exempt the DBS industry. The Commission should not use information that was before Congress at the time section 629 was enacted to reach a different conclusion with respect to the applicability of the requirements of that section. In short, Time Warner requests that the Commission reconsider its use of an exemption as a means of determining that DBS -- one type of MVPD -- currently complies with the Commission's regulations and instead merely clarify that under marketing structures currently in place DBS so complies.

WHEREFORE, for the reasons set forth above, Time Warner respectfully requests that the Commission grant Time Warner's petition for partial reconsideration and clarification of certain aspects of its regulations adopted to foster the commercial availability of navigation devices.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Glenda V. Thompson, a secretary at the law firm Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Reply to Oppositions to Petition For Reconsideration" was served this 7th day of October, 1998, via first class mail, postage prepaid, upon the following:

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